

1604047 (Migration) [2016] AATA 4395 (9 September 2016)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Francesco Milano

VISA APPLICANTS: Mrs Thi Ngoc Diep Le
Miss Le Quynh Tien Nguyen

CASE NUMBER: 1604047

DIBP REFERENCE(S): 2015070782 OSF2015/070782

MEMBERS: Justine Clarke (Presiding)
Mary Cameron

DATE: 9 September 2016

PLACE OF DECISION: Melbourne

DECISION: The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations
- cl.309.221 of Schedule 2 to the Regulations]

Statement made on 09 September 2016 at
10:03am

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 11 March 2016 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicants are the first-named visa applicant, Mrs Le, a 45 year old national of Vietnam and the second-named visa applicant, Miss Nguyen, her 12 year old daughter.
3. Mrs Le applied for the visas on 5 March 2015 on the basis of her relationship with her sponsor, the review applicant, Mr Milano, who is a 54 year old Australian citizen. At the time that Mrs Le applied for the visas, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211 and cl.309.221.
4. The delegate refused to grant the visas on the basis that the Mrs Le did not satisfy cl.309.211(2) and 309.221, and that consequentially Miss Nguyen was unable to satisfy cl.309.321(a). The delegate was not satisfied that Mrs Le and Mr Milano were in a genuine and continuing spousal relationship or that they had a mutual commitment to a shared life together to the exclusion of all others. The delegate found that Mrs Le is not the spouse of Mr Milano, as defined under s.5F of the Act. Mr Milano applied for review on 1 April 2016.
5. Mr Milano appeared before the Tribunal on 31 August 2016 to give evidence and present arguments. Mr Milano was unrepresented. The Tribunal also received oral evidence from Mrs Le, Ms Biet Thi Nguyen, who is Mrs Le's mother and Ms Tam Le, who is Mrs Le's niece. The hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether at the time of application and at the time of decision Mr Milano and Mrs Le were in a genuine spousal relationship.

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

8. Clauses 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen. The Tribunal accepts Mr Milano's oral evidence that he is an Australian citizen. The Tribunal notes that the Department's file also contains relevant pages from Mr Milano's Australian passport, evidencing his Australian citizenship.
9. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there

must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion as to these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the primary visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision.

ARE THE PARTIES VALIDLY MARRIED?

10. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. Mr Milano and Mrs Le were married in Braybrook, Victoria on 6 July 2014. The Department's file includes a copy of documents relating to Mrs Le's divorce with respect to her first marriage and the marriage certificate of 6 July 2014—the original of the latter was tendered for the Tribunal's review at the hearing. There is nothing in the information before the Tribunal to cast doubt on the validity of the marriage, and it was not disputed by the delegate. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE OTHER REQUIREMENTS FOR A SPOUSAL RELATIONSHIP MET?

11. Regulation 1.15A(3) provides relevant factors for determining whether the spousal relationship exists. These are (a) the financial aspects of the relationship; (b) the nature of the household; (c) the social aspects of the relationship; and (d) the nature of the person's commitment to each other.
12. In assessing these issues, the Tribunal has had regard to all documents on the Department's file, documents on the Tribunal's file as well as the oral evidence given at the hearing.

13. The financial aspects of the relationship

14. Mr Milano told the Tribunal that he earns approximately \$3,000 per month as a cleaner in the aged care sector. Both Mr Milano and Mrs Le gave oral evidence that Mrs Le does not work. Mr Milano told the Tribunal that his wife is prohibited from working pursuant to the conditions of her current visa. Mr Milano told the Tribunal, 'I need to support everything. Everything. Every single thing. But I am happy for that because I'm happy to help her'.
15. Mrs Le told the Tribunal that she did not bring any financial resources into the relationship. She gave oral evidence that when she was in Vietnam she had worked in insurance and that she had brought some money with her when she and Miss Nguyen first moved to Australia. Before Mrs Le commenced her relationship with Mr Milano, she had used this money for Miss Nguyen, as well as receiving financial support from Mrs Le's sister, with whom they lived in Braybrook at that time.
16. Mrs Le gave oral evidence that she has received some money from an internet business in Vietnam. She told the Tribunal that in the past her brother sent her about \$2000 to \$3000 from this business in Vietnam every 2–3 months. She told the Tribunal that her brother takes care of the business and that it does not generate much, or any, income anymore. She explained that the money is now used to support their mother. She told the Tribunal that if she needs money, her brother sends her \$1000 or \$2000.
17. When the Tribunal asked why this money was not pooled with Mr Milano's finances, Mrs Le responded that this money had been used for Miss Nguyen's school fees. She stated that when she had met Mr Milano, he had said that he would support her.

18. Both Mr Milano and Mrs Le gave oral evidence that Mr Milano pays the rent. Mr Milano told the Tribunal that they have a joint bank account, into which his pay is deposited, and which Mrs Le accesses to buy food and other things. He told the Tribunal that they had changed banks in the past three months or so but that they had been 'going through this way nearly since the beginning'. He told the Tribunal that it had been his decision to open a joint bank account.
19. At the hearing, Mrs Le stated that the joint bank account had been opened a few months after they had met. The Tribunal clarified and put it to Mrs Le that it was in fact nine days after the parties had first met. Mrs Le responded that Mr Milano had opened an account because he knew that she was not working.
20. When the Tribunal put it to Mr Milano that it seems peculiar to open a joint bank account nine days after meeting someone, Mr Milano responded that he knew that, but 'This is me'. In his own words, 'I will support her until I die. I love her and she loves me'. Later he told the Tribunal, 'I give her my card. Buy whatever you want. ... I know you need help. I like to help her. I like to help people.'
21. Mr Milano told the Tribunal that after some time, he had proposed that he help Mrs Le pay for Miss Nguyen's school fees. Mr Milano's oral evidence was that both he and Mrs Le's sister pay for Miss Nguyen's school fees.
22. The Tribunal finds that Mr Milano is the primary income earner in the relationship and that he is financially supporting Mrs Le and Miss Nguyen. This is consistent with a traditional family arrangement where there is one income earner.
23. Mr Milano and Mrs Le submitted copies of gas, electricity and mobile telephone bills to the Tribunal. The Tribunal notes that the Lumo energy bill states that the gas charges were for the period 7 February 2015 to 10 April 2015. All of the bills submitted are addressed to both parties. The Tribunal accepts these bills as evidence of joint liabilities.
24. The Tribunal gives the financial aspects of the relationship some weight in finding that the parties are now, and were on 5 March 2015—the date of application, in a married relationship.
25. *The nature of the household*
26. The Tribunal finds that Mr Milano, Mrs Le, Miss Nguyen, Ms Le and Mrs Nguyen are all currently living together in the one house in Sunshine North. Mr Milano told the Tribunal, and the Tribunal accepts that he lived in the house for about a month before Mrs Le and Miss Nguyen moved in on 22 June 2014. Ms Le told the Tribunal, and the Tribunal accepts that she has lived in the house with the family for approximately two years. Mrs Nguyen told the Tribunal, and the Tribunal accepts that she has been living with the family since arriving in Australia earlier this year on a visitor visa.
27. A relevant aspect of consideration of the nature of the household is any joint responsibility for the care and support of children. Mrs Le described her husband's relationship with Miss Nguyen as 'good' and said that 'he loves her'. Mr Milano referred to Miss Nguyen as his 'daughter' throughout the hearing. Mrs Le told the Tribunal that Miss Nguyen has had increasingly limited contact with her biological father, who lives in Vietnam, because she has come to appreciate that Mr Milano loves her and takes cares of her.
28. Mr Milano gave oral evidence that both he and Mrs Le offer assistance to Miss Nguyen with her homework. Mrs Le also told the Tribunal that they try to support her with her studies.

29. On the basis of this oral evidence, and Mr Milano's oral evidence that he is partly responsible for paying Miss Nguyen's school fees, the Tribunal finds that there is joint responsibility between Mr Milano and Mrs Le for the care and support of Miss Nguyen.
30. Another relevant aspect of consideration is any sharing of responsibility for housework. Both Mr Milano and Mrs Le gave oral evidence that Mrs Le does the cooking and cleaning; with Mr Milano noting that he sometimes helps with the cleaning and sometimes makes Italian meals. Both parties also told the Tribunal that often they go shopping for groceries together on a Wednesday, which is a day when Mr Milano does not work. The Tribunal accepts this oral evidence.
31. The Tribunal gives great weight to this factor.
32. *The social aspects of the relationship*
33. The Tribunal accepts, on the basis of consistent documentary and oral evidence that Mr Milano and Mrs Le represent themselves as being married to each other.
34. The Tribunal's file contains digital photographs of Mr Milano and Mrs Le, and others, on their wedding day as well as photos of Mr Milano, Mrs Le and Miss Nguyen in a variety of other settings, including a restaurant with others. At the hearing, an album of wedding photos and an album of more general photos were tendered for the Tribunal's review.
35. The Tribunal accepts the oral evidence of Mr Milano and Mrs Le that when they travelled, together with Miss Nguyen, to Vietnam in early March 2015 to lodge the visa applications, they met with members of Mrs Le's family, both in Ho Chi Minh/Saigon and in a home in the country. Mrs Nguyen also gave oral evidence that she had first met Mr Milano when he visited her home in Ho Chi Minh, however it appears that she gave the incorrect date to the Tribunal (June or July 2014 not March 2015). Mr Milano's evidence that when they were in Vietnam there was communal dining to celebrate the marriage in the countryside but, because of the expense, nothing more, is consistent with Mrs Le's earlier answers in her Departmental interview.
36. There was an inconsistency between Mr Milano and Mrs Le's oral evidence at the hearing about the number of guests at their wedding celebration at the restaurant in Docklands—'I think it was around 40 people' compared with 'just over 20'. Mrs Le offered an explanation for her lower figure, namely that some guests had invited their children. The Tribunal gives this inconsistency in evidence little weight as Mrs Le's explanation is plausible, as is Mr Milano's evidence that he had 'not counted' the guests. The Tribunal is mindful that the wedding party was over two years ago and that the parties may not recall with exact precision the number of guests at their wedding.
37. Another relevant aspect of consideration of the social aspects of a relationship is the basis on which the persons plan and undertake joint social activities. In addition to the regular joint shopping trips for groceries, both Mr Milano and Mrs Le also gave consistent oral evidence that they go out for coffees together. They both gave oral evidence that their spare time was spent mainly with family, and that they had not seen much of Mr Milano's friend John Baldwin (who had given a witness statement that was before the delegate) because of his serious health condition.
38. Mr Milano told the Tribunal that Mrs Le is a Buddhist, who enjoys going to the Buddhist temple. He gave oral evidence that he has taken on Buddhism, in addition to his Catholic faith. Mr Milano said that he goes to the temple with Mrs Le. Mrs Le told the Tribunal that they go to the Buddhist temple in Braybrook.

39. The Tribunal accepts Mr Milano and Mrs Le's oral evidence that they plan and undertake these joint social activities.
40. The opinion of the persons' friends and acquaintances about the nature of the relationship is another consideration for determining the social aspects of the relationship. Ms Le told the Tribunal that she first met Mr Milano about two years ago, not having met him in Vietnam. Ms Le answered in the affirmative when asked by the Tribunal whether she considered Mr Milano and Mrs Le's relationship to be genuine and continuing.
41. The Tribunal gives great weight to this factor.
42. *The nature of the person's commitment to each other*
43. At the date of this decision, Mr Milano and Mrs Le have been living together, and also have been married to each other, for over two years.
44. Mr Milano and Mrs Le's relationship developed very quickly. They met at a dinner on 5 April 2014; opened a joint bank account on 14 April 2014 (nine days later); became boyfriend and girlfriend in May 2014—the same month that they decided to move in together and Mr Milano took steps to rent a house; moved in together on 22 June 2014; became engaged four days later, on 26 June 2014, and were married on 6 July 2014 (a ten day engagement). The rapid inception of the relationship from initial meeting to the marriage caused the delegate to have some concerns as to whether the parties were in a genuine and continuing spousal relationship.
45. With respect to the rapid inception of the relationship, both parties told the Tribunal that they were of advanced years. Mr Milano told the Tribunal that he was the one who had instigated the various developments: 'I tell you, all the decisions come from me. Nothing come from her'. The Tribunal accepts Mr Milano's evidence. Mr Milano presented as a man who fell in love and was determined to move things forward. Mr Milano swore that, if he had to, he was prepared to move to Vietnam to be with Mrs Le and Miss Nguyen. However, he saw their future as being in Australia.
46. By contrast, Mrs Le's oral evidence about the nature of her commitment to Mr Milano was limited to details about the length of time that they have been in a relationship.
47. The Tribunal gives some weight to the nature of the person's commitment to each other.

CONCLUSIONS

48. As stated above, the Tribunal is satisfied that the parties are validly married, as required by s.5F(2)(a) of the Act.
49. For the reasons given with respect to the r.1.15A(3) matters, the Tribunal is satisfied that at the time of application and the time of decision, Mr Milano and Mrs Le
- have a mutual commitment to a shared life as husband and wife to the exclusion of all others, as required by s.5F(2)(b) of the Act;
 - have a genuine and continuing relationship, as required by s.5F(2)(c) of the Act; and
 - live together, as required by s.5F(2)(d)(i).

50. The Tribunal is satisfied that at the time the visa application was made and the time of this decision Mr Milano and Mrs Le were spouses for the purposes of the Act, having been in a married relationship pursuant to s.5F(2). Therefore the primary visa applicant meets cl.309.211 and cl.309.221 of Schedule 2 to the Regulations.
51. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.
52. As the primary visa applicant meets the criteria in cl.309.211 and cl.309.221, the secondary visa applicant's ability to satisfy cl.309.321(a) should also be reconsidered.

DECISION

53. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations.
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Justine Clarke
Member

Mary Cameron
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).